

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MIKE M. MAYS

Claimant

VS.

SUPERIOR INDUSTRIES INT., INC.

Respondent

Self Insured

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Docket No. 183,314

ORDER

Both claimant and respondent appealed from a preliminary hearing Order of May 16, 1996, wherein Administrative Law Judge Steven J. Howard granted claimant benefits in the form of authorized medical care through Dr. Rosenthal and his referrals, temporary total disability compensation, and reimbursement to claimant for medical mileage and lodging. Judge Howard denied claimant past medical expenses pending the final award.

ISSUES

Claimant raised the issue of whether the Administrative Law Judge erred in refusing to order respondent to pay past medical expenses.

Respondent raised the issue of whether claimant suffered accidental injury arising out of and in the course of his employment and also questioned the nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant, a long-time employee of respondent, suffered injury to the middle finger of his right hand on June 18, 1992, when his finger was smashed between two pieces of metal. When x-rays were taken of the finger, it was noted that a mass or lesion existed inside the bone of the finger. Follow-up medical treatment resulted in a diagnosis of a giant cell tumor in the bone of the finger. Claimant underwent curettage and autogenous bone grafting of the

finger on two separate occasions, both of which proved unsuccessful, the tumor returning both times. Finally, claimant underwent a ray amputation of the finger.

In 1993 claimant was diagnosed as having lesions on his lungs. Dr. Howard Rosenthal, an orthopedic oncologist from the University of Kansas Medical Center, testified that the pathological fracture suffered by claimant to his middle finger at the time of his original injury resulted in a metastasis of the cancer cells through the blood stream and into the lungs. Dr. Rosenthal felt, within a reasonable degree of medical probability, that the cancer in claimant's lungs developed as a result of the tumor in his finger which was aggravated by the work related injury. He went on to state that the accident most likely caused the pathological fracture to the phalanx of the right middle finger leading to the metastasis and the lesions in the lung.

Dr. Rosenthal based his opinions on an assumption that claimant had suffered a pathological fracture to the right long finger at the time of the accident. Even after it was pointed out to Dr. Rosenthal that x-rays showed no pathological fracture after the accident, until September 1992 Dr. Rosenthal maintained his opinion regarding causation of the lesions.

The Appeals Board finds that Dr. Rosenthal, as the treating physician, was in a unique position to evaluate claimant's condition and the progress of the cancer. As such the Appeals Board finds, for preliminary hearing purposes, that claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent and that the nature and extent of his injury extends to the lesions found in claimant's lungs. Therefore, the Order of Administrative Law Judge Steven J. Howard authorizing medical treatment with Dr. Rosenthal and his referrals, temporary total disability compensation, and mileage reimbursement should be and is hereby affirmed. It should be noted that this finding is based upon the record as it presently exists and is, therefore, not intended to be a final pronouncement on the compensability of the claim.

Claimant's contention that the Administrative Law Judge failed to order past medical expense paid, while being a legitimate issue to raise at the time of final award, is not an issue which can be reviewed by the Appeals Board on appeal from a preliminary hearing. K.S.A. 44-534a and K.S.A. 44-551 limit the rights of parties to appeal from preliminary hearings. As K.S.A. 44-534a grants the Administrative Law Judge the authority to rule on issues dealing with medical care and treatment, the decision by the Administrative Law Judge to not order past medical expenses is not one appealable to the Appeals Board at this time.

WHEREFORE, it is the finding, decision, and order of the Appeals Board for preliminary hearing purposes that the Order of Administrative Law Judge Steven J. Howard dated May 15, 1996, should be and is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

The undersigned respectfully dissents from the opinion of the majority in the above matter. Claimant suffered a traumatic injury to his finger which, according to x-rays taken shortly after the injury and as late as August 1992, did not result in a pathological fracture of his finger. Dr. Rosenthal, the claimant's expert, based his opinion that the metastasis to the lung stems from this injury, upon his understanding that a pathological fracture occurred at the time of the accident, causing increased blood flow to and from the trauma site thus allowing the cancerous cells to escape into the blood stream and invade the lungs. Dr. Rosenthal's opinion is based upon the assumption that a pathological fracture occurred. The evidence in the record does not support this. X-rays taken in June, July, and August 1992 fail to indicate a pathological fracture to claimant's finger. Only upon reviewing x-rays from September 13, 1992, is Dr. Rosenthal able to specifically identify that a pathological fracture exists. There is no indication in the record as to when this fracture occurred, whether it stems from the accident or whether it may have stemmed from any of the surgeries undergone by claimant during the care and treatment of the tumor.

The medical evidence does not indicate that the surgery to claimant's finger was necessitated by the injury. To the contrary, the medical evidence indicates that the surgery performed on claimant's finger was as a result of the discovery of a tumor in the bone of claimant's hand. This tumor was not aggravated in any way by the injury but was merely discovered after x-rays were taken of claimant's finger.

The medical evidence, including that of Dr. Rosenthal and that of Dr. Gary A. Ratkin, a board certified internal medicine specialist in oncology, verified that the tumor itself was not in any way created or aggravated by the injury. Rather, the evidence clearly shows that the tumor preexisted the injury and the surgery would have been necessitated regardless of the injury. Dr. Ratkin also opined that the trauma to the finger had no effect on the metastasis of the giant cell tumor cancer into claimant's lungs. Substantial medical evidence placed into evidence verifies that giant cell tumors are an unusually rare type of cancer which only undergo metastasis in 6 percent or less of the cases. This condition was described by one doctor as a rare disease with the metastasis being an even more rare occurrence. The true

progression of metastasis when dealing with giant cell tumors is not fully understood having only been recently diagnosed and successfully treated.

Liability when cancer is aggravated by a work-related injury is discussed in detail by the Supreme Court in Cox v. Ulysses Cooperative Oil & Supply Co., 218 Kan. 428, 544 P.2d 363 (1975). In Cox, the claimant, a 56-year old employee of respondent, scratched a dark mole on his back below his left shoulder resulting in aggravation of the mole. The mole began to bleed and, after being bumped several more times, raised up, grew, and became tender. When the mole was examined by the doctor it was diagnosed as being malignant. It was later discovered that the malignancy had spread to claimant's lymph glands ultimately resulting in claimant's death. The Supreme Court, when reviewing the medical evidence of Dr. Evan R. Williams, found that Dr. Williams' testimony substantially met the test of reasonable medical certainty when deciding whether the cancerous mole was injured or aggravated in the course of claimant's employment.

In this situation, the evidence is not so certain. The medical testimony of Dr. Ratkin concludes that claimant's lung lesions have no connection whatsoever to the injury to claimant's finger. Only Dr. Rosenthal connects the two conditions based upon an assumption that claimant suffered the pathological fracture on the date of accident. Medical evidence in the file indicates that claimant did not suffer a pathological fracture on the date of injury but actually developed the fracture at some later time with the fracture not appearing on x-ray until three months after the original injury. This Board Member would find that claimant has failed to prove by a preponderance of the credible evidence that the metastasis of the giant cell cancer into claimant's lung is connected to the injury suffered to claimant's finger on June 18, 1992, and would deny additional benefits to claimant beyond the treatment provided to his finger.

Respectfully submitted,

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
John I. O'Connor, Pittsburg, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director